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**DISCRIMINATION IN THE COMMON CARRIER INDUSTRY
AND AT THE FEDERAL COMMUNICATIONS COMMISSION**

Erik Williams, on behalf of the
Minority Media & Telecommunications Council
Communications Task Force
National Black Business Council
3636 16th Street, N.W., Suite B-863
Washington, D.C. 20010
(202) 332-7005

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DISCRIMINATION IN THE COMMON CARRIER INDUSTRY AND AT THE FEDERAL COMMUNICATIONS COMMISSION

by: Erik Williams*

Historically, the African-American community has been denied equal access to resources of empowerment in every facet of American society. The Federal Communications Commission (FCC) can take official notice, for example, that basic telephone service, as well as enhanced, custom calling services usually reached the African-American community last. In fact, large numbers of African-Americans are without service even today. Presently, with the explosion in technology (i.e. video dialtone), there is much discussion of universal service for all. Yet in the initial plans proposed by the various common carriers, the realization of this concept has fallen short of the mark in many urban areas. This memorandum briefly outlines the scope of discrimination in the common carrier industry and at the FCC, and recommends the FCC adopt more aggressive policies to ensure non-discriminatory employment practices and increased minority ownership in the common carrier industry, particularly in its upcoming licensing of personal communications services (PCS).

The lack of equal access to the information highway is equivalent to handing out archaic textbooks to school children. As the Supreme Court stated in the landmark case Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), "[s]egregation with the sanction of law [has] a

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tendency to [retard] the educational and mental development of Negro children."¹ Just as "Jim Crow" era school segregation had the effect of retarding the development of generations of people, so has a "Jim Crow" telecommunications system impeded the growth process of the current generation. When viewed in this historical light, equal access to all areas of the communications industry is crucial.

The importance of the attainment of this goal of equal access is succinctly acknowledged by the Office of Technology Assessment. In its summary publication Critical Connections: Communication for the Future, OTA states that "[u]nequal access to communication resources leads to unequal advantages, and ultimately to inequalities in social and economic opportunities."² This lucid observation cannot be underscored.

Specifically, the FCC's antiquated common carrier EEO regulations are insufficient to achieve the Congressional goal of increased opportunities for minorities and women in "new, emerging, and alternative technologies." Adopted in 1970, the FCC's common carrier policy, a forerunner to cable TV's EEO regulations, merely requires telephone companies to adopt self-enforcing EEO programs and to file Annual Employment Reports. Furthermore, there has

¹ "Today, America is finally at the point where it has the potential to resolve in a positive way many of the problems of the past. If we dare ignore this opportunity, the alternative will be to drift into further polarization. The ultimate direction in which this nation moves may well depend upon how it interprets the legacy - both to its black citizens and to its white - of slavery assured and guaranteed by law." See, Judge A. Leon Higginbotham, In the Matter of Color: Race and the American Legal Process, Oxford: University Press, 1978, p. ix.

² See, Office of Technology Assessment, Critical Connections: Communication for the Future - Summary, January 1990, p. 8.

historically been no minority ownership initiative applicable to common carriers in contrast to the limited policies targeted at the broadcast industry.

I. The Lack of FCC Enforcement of its EEO Policies Stymied Minority Advancement in the Common Carrier Industry

Over the past 30 years, the FCC has not enforced its common carrier EEO regulations. The annual employment reports filed by the telephone companies are not frequently reviewed for accuracy or compiled into industry-wide employment trend reports. They are most often stored in filing cabinets. The administration of the common carrier EEO regulations is the **part-time** responsibility of one individual in the Industry Analysis Division of the Common Carrier Bureau. The FCC's neglect in the area of enforcement has contributed to the pervasive pattern of discrimination in the telecommunications industry.

Moreover, in contrast to the 1992 Cable Act EEO provisions, the common carrier EEO regulations have 9 instead of 15 job categories. These job categories cannot accurately measure the number of women and minorities in decision-making positions. The regulations do not require on-site audits of industry programs. Also, the regulations do not mandate financial forfeitures for violations of the law. As currently structured and enforced, the common carrier EEO regulations fall embarrassingly short of achieving Congress' goal of increased opportunities for minorities and women in all facets of the communications industry.

In its recent EEO Notice of Inquiry, the FCC requested comment on whether its EEO jurisdiction should be extended to common carriers, particularly those that compete with broadcast, cable TV, and MVPDs. See, NOI para. 39. The universal application of EEO rules

is justified by the growing trend in the convergence of previously distinct industries. Today, new technologies, ventures and mergers combine industries that at one time appeared discrete and insular. The lines of distinction that have historically divided communications systems are quickly disappearing.

According to Kellogg, Thorne, and Huber in Federal Communications Law, the telecommunications industry is moving rapidly toward a myriad of mixed media (radio/landline), integrated, digital, broadband (video) networks, all interconnecting seamlessly to another."³ An example of this convergence is cellular telephony, which resulted from the synthesis of radio, telephone, and computers. Also, fiber-optic systems represent a merger of radio, telephone lines, and electronics. The merger of cable companies and telephone companies is another example of convergence in the telecommunications industry. In view of this metamorphic convergence occurring in the telecommunications industry, the FCC should quickly expand the scope of the application of the EEO provisions of the 1992 Cable Act to include all Title II common carrier companies with a work force of significant size.

Traditionally, the basis for the FCC's EEO jurisdiction has been the nexus between content-based services and diversity.⁴ Essential services (newspapers, books, medical services, and civic information), however, can be increasingly accessed by means of sophisticated digitized multi-media technology. Policies of diversity that were once reserved for content-based

³ Michael K. Kellogg, John Thorne, Peter W. Huber, Federal Telecommunications Law, Boston, MA: Little, Brown and Company, 1992, p. 53.

⁴ See, NAACP v. Federal Power Commission, 425 U.S. 662 (1975), footnote 7.

services must be applied to new services that will control access to information in other formats. Common carriers can no longer be viewed as strictly content-neutral service providers.

Companies that serve as conduits of information created by others will impact diversity by determining: (1) the nature of the services that will store, process and assemble data and programming for electronic transmissions, (2) the consumer hardware market that will initially receive services, and (3) the points of access to the information superhighway. For example, affluent households are provided custom calling features at three times the rate of non-affluent households. Hence, a high priority has been placed on development of this kind of product for consumers with a high level of disposable income. The telephone companies committed focus of resources on this specific demographic market, however, at the exclusion of non-affluent groups primarily in urban areas, highly suggests an invidious form of "redlining" in the telecommunications industry. Just as minority ownership in broadcasting has improved the quality of programming to the minority community, increased ownership of common carrier facilities will improve the level of informational services delivered to heavily populated minority areas.

In addition, payment terms, the location of public telephones, enhanced service features, and the availability of foreign language operators are all factors that greatly determine access for members of minority and low-income communities. In short, by controlling access, common carriers significantly determine whether broad and diverse segments of society will receive advanced communication services. However, the continuing legacy of discrimination in the

telecommunications suggests that equal access will not exist without an expansion of common carrier EEO regulations and ownership opportunities for minorities.⁵

II. Minorities have Been Excluded From Ownership Opportunities in the Common Carrier Industry

The "break-up" of AT&T created the largest long distance interexchange carrier (IXC) and seven (7) regional Bell operating companies (RBOCs) for local telephone service, and competition emerged mainly in the IXC arena with MCI and US Sprint. Yet despite the divestiture and increased competition in this industry, ownership opportunities for minorities and women have not advanced. Minorities still own approximately 0.5 percent of common carrier facilities.

The proposed recommendations for expansion of minority ownership policies in common carrier are well within Congress' (and the FCC's) broad remedial powers and, under existing law, are constitutionally permissible. Industry-wide past discrimination, and the FCC's historical perpetuation of it, in the telecommunications industry justifies carefully tailored remedial action even under the strict scrutiny test. Fullilove v. Klutznick, 448 U.S. 448 (1980), and cases that followed it, allows the FCC to regulate specific policies for minority ownership to the extent necessary to remedy past (and present) discrimination.

⁵ See, Kriss v. Sprint, 1994 U.S. Dist. Lexis 6311, (racial discrimination); Davis v. Sprint United Management, 1993 U.S. Dist. Lexis 9686 (racial discrimination); Parton v. GTE, 971 F.2d 150, (sex discrimination); Kamberos v. GTE, 603 F.2d. 598, (sex discrimination); Jackson v. GTE, 734 F. Supp. 258, (age & race discrimination).

In Fullilove, the Court upheld the constitutionality of a congressionally ordered set-aside program designed to redress discrimination that had impeded the growth of minority businesses. Congress mandated that ten percent of all money spent on state and local public works projects undertaken with federal funds must be spent with minority-owned firms. The Court, applying an intermediate level of scrutiny, held that although the federal courts could remedy only specific acts of discrimination, Congress possessed broader power to enforce the equal protection clause, even if the concept of equality necessitated a widespread program to remedy past discrimination.⁶

Alternatively, in City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989), the Court struck down a Richmond, Virginia, ordinance which required businesses holding municipal construction contracts to subcontract at least thirty percent of the dollar value of the job to minority-owned firms. In distinguishing the Richmond policy from the congressional program upheld in Fullilove, the Court stated that Congress, unlike states and cities, had express authority to enforce the principles of the equal protection clause under Section 5 of the Fourteenth Amendment. The Court held that Congress had the authority to adopt programs designed to correct the effects of discrimination.⁷

⁶ "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce the equal protection guarantees." Fullilove, 448 U.S. 448, 483 (1979) (opinion of Burger, C.J.).

"It is beyond question therefore that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects." Id. at 502 (opinion of Powell, J., concurring).

⁷ The local entity in Croson, the Richmond City Council, could justify discrimination based on race only if there existed evidence of past discrimination. "...if the city could show that it had essentially become a 'passive' participant in a system of racial exclusion practiced by the

Likewise, in Metro Broadcasting v. Federal Communications, 497 U.S. 547 (1990), the Court followed its decision in Fullilove in deferring to Congress and in applying intermediate scrutiny to Congress' preferential measures.⁸ (The intermediate scrutiny test requires that there exist an important governmental interest within the authority of Congress and that the means chosen be substantially related to the achievement of those objectives.) The Court upheld the FCC's policy of awarding preference to minority applicants for broadcast stations and its broadcast license distress sale policy. The Court held that the challenged FCC policies were narrowly designed to promote diversity in broadcasting and to redress the historical discrimination in the broadcast industry. Any burden on non-minorities was considered slight. The Court found that the goal of these FCC policies fell within the purview of Congress' broad authority to enforce the principles of the equal protection clause. Under this rationale, the Court upheld the challenged FCC regulations.

Discrimination in the communications industry is well-documented.⁹ Minorities and women have been barred from ownership in the communications industry as a result of discriminatory practices, in ways similar to the minority contractors in Fullilove. The Report of the FCC Small Business Advisory Committee Regarding Gen Docket 90-314, dated September 15, 1993, documents the barriers faced by minorities and women in the

elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system." City of Richmond v. J. A. Croson, 488 U.S. 469, 492 (1988).

⁸ "...deference was appropriate in light of Congress' institutional competence as the National Legislature." Metro Broadcasting, 497 U.S. at 563.

⁹ See, Footnote 5, supra.

telecommunications industry.¹⁰ Furthermore, the Court in Metro Broadcasting acknowledged that "Congress has consistently recognized the barriers encountered by minorities in entering the broadcast industry,"¹¹ and the courts have deferred to congressional factfinding in the context of racial preferences. Congress is currently developing a record to support similar findings in the common carrier industry. See, House of Representatives, Small Business Subcommittee, hearings May 20, 1994.

Specifically, in the context of PCS license allocation, as with broadcast licenses, the historical barriers to ownership are similarly well-documented. Under Fullilove, a reviewing court would find that the proposed PCS preferences served a valid and important governmental interest in promoting economic opportunity and competition for businesses owned by minorities and women.

Moreover, the preferential treatment proposed by the FCC in the PCS context is substantially related to Congress' objectives of promoting economic (i.e. ownership) opportunity for minorities and women. In assessing the validity of the means adopted by Congress, the Court in Fullilove deferred to Congress' remedial powers, evaluated the impact on non-preferred entities and determined whether the preference was overinclusive.

¹⁰ "Women and members of minority groups have encountered special barriers to telecommunications ownership." Report of the FCC Small Business Advisory Committee Regarding Gen Docket 90-314 ("SBAC Report") at 3.

¹¹ "The 'special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation.'" Metro Broadcasting, 497 U.S. at 572 (citation omitted).

The proposed PCS preferences satisfy the Fullilove standard. Both Congress and the FCC have had substantial experience in devising minority preferences and thus both entities possess the requisite knowledge to tailor effective preferences for the issuance of PCS licenses. Providing the set-aside spectrum for minorities ensures that qualified designated entities will receive PCS licenses. Furthermore, the other preferential devices contemplated - preferential payment terms, tax certificates and bidding preferences - would allow minorities and women access to capital markets to participate effectively in the competitive bidding process for PCS licenses. The means proposed by the FCC are substantially related to the objective of promoting economic opportunity for minorities and women.

Furthermore, the proposed system of PCS preferences not only furthers the government's interest in promoting economic opportunity for minorities and women, but also furthers the government's interest in media diversity. In Metro Broadcasting, the promotion of diversity of programming in broadcasting was held to be an important governmental interest justifying preferential treatment of designated entities. The preferential treatment of designated entities in the allocation of spectrum for PCS is substantially related, as were the preferences in Metro Broadcasting, to the goal of diversity of ownership and viewpoints.

III. CONCLUSIONS

For the above reasons, the EEO provisions of the 1992 Cable Act should apply to common carriers. The FCC should also adopt the numerous preferences for minorities and women in the allocation of PCS licenses. The rationale upholding the federal programs in Fullilove and Metro are equally applicable here.

With an aggressive regulatory program, the FCC can eliminate discrimination in telecommunications. To that end, the FCC must develop a regulatory scheme that reflects the trend of convergence and provides for the diversity in the common carrier industry through employment and ownership. The FCC should also conduct an extensive rulemaking to chronicle the pervasiveness of discrimination in the telecommunications common carrier industry.